M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-149-90
ABDUL HAMID OMAR LP, EDGAR JOSEPH JR AND WAN YAHYA SCJJ
16 DECEMBER 1993

Contract *— Auction — Whether sale concluded at the fall of the auctioneer's hammer — Purchaser failed to pay balance of purchase price within stipulated time — Whether vendor divested of all beneficial interest in his land — Whether bare or constructive trusteeship arose — National Land Code 1965 ss 267(1)(a) & 259(3)(a)*

Land Law *— Sale of land — Public auction — Failure of purchaser to make payment of balance within stipulated time — Whether purchaser entitled to extension of time to make payment under order of court for sale — Whether terms and conditions of sale may be varied —Whether vendor had right to be heard at application by purchaser for variation of terms*

Land Law *— Sale of land — Public auction — Passing of proprietary right under s 267(1)(a) of the National Land Code 1965 — National Land Code 1965 s 267(1)(a)*

Land Law *— Sale of land — Public auction — Whether vendor's rights abrogated to purchaser when order for sale made — Whether vendor can call off sale even when auction is in progress — National Land Code 1965 s 266*

Land Law *— Indefeasibility of title — Failure to comply with ss 258(a), (b) & 261(1)(c) of the National Land Code 1965 — Whether mere irregularity — Whether title unlawfully acquired and therefore defeasible — National Land Code 1965 ss 258(a), (b) & 261(1)(c)*

Siland Sdn Bhd ('the first respondent') was the registered owner of a piece of land ('the property') which it charged to the second appellant, Eu Finance Bhd. Due to a default on the part of the first respondent, the second appellant applied to the senior assistant registrar ('the SAR') and obtained an order for sale of the property by public auction. M & J Frozen Food Sdn Bhd ('the first appellant') was the highest bidder and was pronounced the purchaser of the property. The first appellant paid a 25% deposit of the total purchase price as provided under the conditions of sale, while the balance of the purchase money was to be paid into court within 30 days from the date of sale. However, this was not done.

In view of this default, the first respondent entered a private caveat on the property and commenced an action for a rescission of the contract and forfeiture of the deposit paid by the first appellant. The caveat was subsequently removed on technical grounds. Before the caveat was removed, the first appellant obtained an order for the completion date to be extended. As the first respondent was not made a party in the application for extension of time, it applied for and was

granted an order for leave to intervene as an aggrieved and interested party, and to set aside the order for extension of time. Subsequently, a year after the date of completion, the first appellant forwarded the balance sum to the SAR who accepted the money and issued the certificate of sale to the first appellant. The first appellant presented the certificate for registration. The first respondent subsequently took out a summons-in-chambers for final judgment to be entered against the first appellant who, in turn, applied for the first respondent's action to be struck out. Both summonses were heard simultaneously. The trial judge declared the deposit forfeited, annulled the certificate of sale issued by the SAR and cancelled the registration of transfer in respect of the property. The judge also made orders for the return of the issue document of title and ordered the property to be resold. [See [1990] 2 MLJ 502.]

In this appeal, the issues were: (i) whether in a sale of land in a public auction, the sale is completed at the fall of the auctioneer's hammer; (ii) whether the court has the power to extend time for a defaulting purchaser to complete the sale and purchase agreement after the agreed date of completion had passed; and (iii) whether in the event of a negative answer to either circumstance above, the High Court was empowered to make the order as it did. It was contended on behalf of the appellant that the trial judge could not have made the order as he did because at the fall of the auctioneer's hammer in a public auction, the sale was completed and whatever proprietary rights which belonged to the chargor had come to an end.

Held, dismissing the appeal:

(1) The terms 'sale concluded', 'conclusion of sale' and 'sale shall be completed' as used in ss 259(2), 266 of the National Land Code 1965 ('the NLC') and s 11 of the Johor Auction Sales Enactment 1932, respectively are merely employed to signify that point of time when there was an acceptance of the bid in accordance with the sale and purchase agreement or sometimes referred to as the conditions of sale. The sale at this juncture had only been concluded in the sense that the goods will no longer be offered for sale to prospective buyers and the successful bidder cannot be permitted to retract his acceptance. Thereafter, each party to the contract of sale must perform his part of the obligation and until then, no executed or actual sale would have been concluded. Hence the term 'conclusion' in the context of these sections can only mean conclusion of certain aspects of the sale when there was an agreement between the parties to sell and buy the property but the proprietary right has yet to be conveyed from the vendor to the purchaser.

(2) At the fall of the auctioneer's hammer, no money had yet changed hands between the parties and neither had any documents been signed. In an auction, the vendor is regarded as having divested

himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full. As a bare or constructive trusteeship could only arise on payment of the balance of the purchase price or on payment of the full purchase price, the issue of non-payment of the full purchase price alone was sufficient to negate the constitution of any constructive or bare trust and consequently, the asserted transfer of the proprietary right from the second appellant as vendor to the first appellant as purchaser. In any event, s 267(1)(a) of the NLC, which provides that the passing of the interest in the proprietary right from the first respondent to the first appellant would occur on registration and after the issuance of a certificate given under s 259(3)(a), clearly negated any proposition that the first respondent abdicated his proprietary rights at that stage of the auction sales.

(3) The first respondent did not abrogate all his rights to the first appellant at the making of the order for sale. Even after the order of sale was made and when the auction sale was already in progress, but before a bid had been accepted, the first respondent still retained the right to tender payment of the amount which it owed the second appellant and call off the sale under s 266 of the NLC.

(4) The terms or conditions of sale may be varied, but this has to be done by the court after giving the first respondent the right to be heard. As the court's power to order the sale was derived from the statutory provisions of the NLC after giving the first respondent the right to be heard, it was manifest that any alteration to the terms or conditions must likewise be exercised. Any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the first respondent was ultra vires the authority to sell under the NLC. Therefore, as the alteration of the completion date was made without giving notice to the first respondent, the subsequent order made by the SAR was void as being ultra vires the NLC.

(5) Indefeasibility can be rebutted not only in instances of fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired. In the present appeal, failure to comply with the statutory requirements of paras (a) and (b) of s 258 and para (c) of s 261(1) of the NLC was not just a mere irregularity, but was an illegality which struck at the root of the first respondent's right to be heard. Therefore, the certificate issued by the SAR was ultra vires the statutory provisions of the NLC and the title was unlawfully acquired by the first appellant. The title of the first appellant was defeasible under s 340(2)(c) of the NLC and the learned judge had arrived at a correct decision when he made the order for the cancellation of the registration of transfer.

A **[Bahasa Malaysia summary**

Siland Sdn Bhd ('responden pertama') merupakan tuan punya berdaftar sebidang tanah ('harta itu') yang telah digadaikan kepada perayu kedua, Eu Finance Bhd. Disebabkan keingkaran responden pertama, perayu kedua telah memohon kepada penolong kanan
B pendaftar ('PKP itu') dan telah mendapatkan suatu perintah jualan harta itu melalui jualan lelong awam. M & J Frozen Food Sdn Bhd ('perayu pertama') merupakan penawar yang tertinggi dan telah diisytiharkan sebagai pembeli harta itu. Perayu pertama telah membayar deposit sebanyak 25% jumlah harga belian seperti yang diperuntukkan
C di bawah syarat jualan, sementara baki harga belian dikehendaki dibayar ke dalam mahkamah dalam masa 30 hari dari tarikh jualan. Tetapi ini tidak dilakukan.

Memandangkan keingkaran ini, responden pertama telah memasukkan suatu kaveat persendirian ke atas harta itu dan telah memulakan suatu tindakan untuk membatalkan kontrak itu dan
D melucuthak deposit yang telah dibayar oleh perayu pertama. Kaveat itu kemudiannya telah dibatalkan atas dasar teknikal. Sebelum kaveat itu dibatalkan, perayu pertama telah mendapat suatu perintah untuk melanjutkan tarikh penyelesaian kontrak itu. Oleh kerana responden pertama tidak dijadikan suatu pihak kepada permohonan untuk perlanjutan masa itu, ia telah memohon dan mendapatkan suatu
E perintah untuk kebenaran mencelah sebagai suatu pihak terkilan dan berkepentingan, dan untuk mengetepikan perintah perlanjutan masa itu. Kemudiannya, setahun selepas tarikh penyelesaian kontrak itu, perayu pertama telah menghantar baki harga jualan harta itu kepada PKP itu yang telah menerima wang itu dan mengeluarkan suatu
F perakuan penjualan kepada perayu pertama. Perayu pertama telah menyerahkan perakuan itu untuk didaftarkan. Responden pertama kemudiannya telah mengeluarkan suatu saman dalam kamar untuk memasukkan penghakiman muktamad terhadap perayu pertama dan perayu pertama pula memohon supaya tindakan responden pertama itu dibatalkan. Kedua-dua saman itu telah didengar bersama. Hakim
G perbicaraan telah melucuthakkan deposit itu, membatalkan perakuan jualan yang dikeluarkan oleh PKP itu dan membatalkan pendaftaran pindahmilik harta itu. Hakim juga telah membuat perintah supaya dokumen hakmilik itu dikembalikan dan harta itu dijual semula. [Lihat [1990] 2 MLJ 502.]

H Dalam rayuan ini, isu yang ditimbulkan adalah: (i) sama ada dalam suatu jualan tanah melalui jualan lelong awam, jualan itu selesai apabila tukul pelelong itu dijatuhkan; (ii) sama ada mahkamah mempunyai kuasa untuk melanjutkan masa supaya seorang pembeli yang ingkar dapat menyelesaikan perjanjian jualbeli itu selepas tarikh penyelesaian yang dipersetujui itu telah lepas; dan (iii) sama ada jika
I jawapan kepada kedua-dua keadaan diatas adalah negatif, Mahkamah Tinggi mempunyai kuasa membuat perintah yang telah dibuatnya itu. Telah dihujahkan bagi pihak perayu bahawa hakim perbicaraan tidak

boleh membuat perintah yang dibuatnya itu kerana apabila tukul pelelong dijatuhkan dalam suatu jualan lelong awam, jualan itu telah selesai dan sebarang hak keempunyaan yang dimiliki oleh penggadai ditamatkan.

Diputuskan, menolak rayuan itu:

(1) Terma 'sale concluded', 'conclusion of sale' dan 'sale shall be completed' sebagai yang digunakan dalam ss 259(2), 266 Kanun Tanah Negara 1965 ('KTN') dan s 11 Enakmen Jualan Lelong Johor 1932, masing-masing hanya digunakan untuk menyatakan masa apabila terdapatnya suatu penerimaan tawaran yang menurut perjanjian jualbeli atau kadang-kalanya dirujuk sebagai syarat-syarat jualan. Penjualan pada takat ini telah diselesaikan dalam ertikata bahawa barang-barang itu tidak akan ditawarkan lagi kepada pembeli prospektif dan pembuat tawaran yang berjaya tidak akan dibenarkan menalik balik penerimaannya. Selepas itu setiap pihak kepada kontrak perjanjian itu mesti melaksanakan obligasi masing-masing dan sehingga itu, tidak akan terdapat penjualan yang tersempurna atau yang sebenar. Oleh itu, terma 'conclusion' di dalam konteks seksyen-seksyen ini hanya bermaksud penyelesaian aspek tertentu penjualan itu apabila terdapat perjanjian di antara pihak-pihak tersebut untuk menjual dan membeli harta itu tetapi hak tuanpunya belum lagi diberi oleh penjual kepada pembeli.

(2) Apabila tukul pelelong dijatuhkan, masih tidak ada wang yang bertukar tangan antara pihak-pihak tersebut dan tidak ada dokumen yang ditandatangani. Di dalam suatu jualan lelong, penjual dianggap sebagai telah melepaskan kesemua kepentingan benefisial di dalam tanahnya dan meletakhaknya dalam pembeli hanya pada masa memorandum pindahmilik disempurnakan dan apabila harga jualan dibayar sepenuhnya. Oleh kerana suatu 'bare or constructive trusteeship' hanya boleh timbul atas bayaran baki harga belian atau atas bayaran harga belian penuh, isu mengenai ketidakbayaran harga belian penuh dengan sendirinya adalah mencukupi untuk menidakkan penubuhan sebarang 'bare or constructive trust' dan seterusnya, menidakkan pemindahan hak keempunyaan yang dikatakan itu daripada perayu kedua sebagai penjual kepada perayu pertama sebagai pembeli. Walau bagaimanapun, s 267(1)(a) KTN, yang memperuntukkan bahawa pemindahan kepentingan dalam hak keempunyaan daripada responden pertama kepada perayu pertama hanya berlaku pada masa pendaftaran dan selepas pengeluaran suatu sijil di bawah s 259(3)(a), jelas menidakkan sebarang cadangan bahawa responden pertama telah melepaskan hak keempunyaannya pada peringkat itu dalam jualan lelong.

(3) Responden pertama tidak memupuskan kesemua haknya kepada perayu pertama apabila perintah jualan itu dibuat. Walaupun selepas perintah jualan itu dibuat dan apabila jualan lelong itu sedang dijalankan, tetapi sebelum suatu tawaran diterima,

responden pertama masih memegang hak untuk membayar jumlah yang terhutang kepada perayu kedua dan membatalkan jualan itu di bawah s 266 KTN.

(4) Terma atau syarat jualan boleh diubah, tetapi ini mesti dilakukan oleh mahkamah selepas memberi responden pertama hak untuk didengar. Oleh kerana kuasa mahkamah untuk memerintahkan jualan itu didapati daripada peruntukan KTN selepas memberi responden pertama itu hak untuk didengar, adalah jelas bahawa sebarang perubahan kepada terma atau syarat perjanjian mesti juga dilakukan dengan cara yang sama. Sebarang perubahan kepada perintah jualan atau terma dan syarat yang dibuat di bawahnya tanpa kehadiran dan tanpa penyampaian notis yang perlu kepada responden pertama itu adalah ultra vires kuasa menjual di bawah KTN. Oleh kerana perubahan tarikh penyelesaian dibuat tanpa memberi notis kepada responden pertama, perintah yang telah dibuat oleh PKP itu adalah terbatal kerana ultra vires KTN.

(5) Ketakbolehsangkalan boleh dipatahkan bukan hanya dalam kes fraud tetapi juga dalam kes di mana pendaftaran dilakukan dengan menggunakan suatu suratcara yang batal atau tidak mencukupi atau di mana hakmilik atau kepentingan itu didapati dengan cara yang menyalahi undang-undang. Di dalam rayuan ini, kegagalan untuk mematuhi keperluan statutori dalam s 258(a) dan (b) dan s 261(1) KTN tidak hanya merupakan suatu luar aturan tetapi merupakan suatu kepenyalahan undang-undang yang kena kepada asas hak responden pertama untuk didengar. Oleh itu, sijil yang dikeluarkan oleh PKP itu adalah ultra vires peruntukan statutori KTN dan hakmilik telah diperolehi oleh perayu pertama dengan cara yang menyalahi undang-undang. Hakmilik perayu pertama boleh disangkal di bawah s 340(2)(c) KTN dan hakim yang arif telah membuat keputusan yang betul apabila beliau membuat perintah untuk membatalkan pendaftaran pindahmilik itu.]

Notes

For cases on sale of land by auction, see 8 *Mallal's Digest* (4th Ed) paras 1803–1810.

Cases referred to

1 *Foster (John) & Sons v Inland Revenue Commission* [1894] 1 QB 516 (refd)
2 *Taylor v Land Mortgage Bank of Victoria Ltd* (1886) 12 VLR 748 (refd)
3 *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 (refd)
4 *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47 (refd)
5 *Chang v Registrar of Titles* (1976) ALJR 404 (refd)
6 *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149 (refd)
7 *Official Assignee v Johnston* [1975–77] ALR 285 (refd)

8 *Karruppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 (refd)
9 *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 (distd)
10 *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 (refd)
11 *Development & Commercial Bank Bhd JB v Kim Ming Choon* [1991] 1 CLJ 732 (folld)
12 *Siland Sdn Bhd & Anor v M & J Frozen Food Sdn Bhd & Anor* [1990] 2 MLJ 502 (folld)
13 *Kuala Lumpur Finance Bhd v Yap Poh Khian (Teo Sik Eng & Anor, Interveners)* [1992] 1 MLJ 472 (folld)
14 *Public Bank Bhd v Phan Seng Kee & Ors* [1991] 3 CLJ 2560 (refd)
15 *Malayan United Finance Bhd v Tan Lay Soon* [1991] 1 MLJ 504 (refd)
16 *Gibbs v Messer* [1891] AC 248 (folld)
17 *United Malayan Banking Corp Bhd v Syarikat Perumahan Lunas Sdn Bhd (No 2)* [1988] 3 MLJ 352 (folld)
18 *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 (folld)
19 *Forsyth & Anor v Blundell & Anor* (1973) 129 CLR 477 (refd)

Legislation referred to
Johor Auction Sales Enactment 1932 s 11
National Land Code 1965 ss 258(2), 259(2), 266, 267(1)(a)

Appeal from: Civil Suit No 22–980–87 (High Court, Johor Bahru)

G Sri Ram (*Yap Siong Cheng* with him) (*Arthur Lee & Co*) for the first appellant.
Wong Kim Fatt (*S Gunasegaran* with him) (*Guna & Co*) for the first respondent.

Cur Adv Vult

Wan Yahya SCJ (delivering the judgment of the court): In the High Court in Johor Bahru, the first respondent, Siland Sdn Bhd (hereinafter referred to as 'the chargor') successfully applied for and obtained a decree annulling the earlier order for sale made by the senior assistant registrar ('the SAR'), forfeiture of the deposit and other consequential reliefs in respect of an auction sale of its land initiated by the second respondent, Eu Finance Bhd ('the chargee'). The present appeal against the High Court's decision was brought by the first appellant, M & J Frozen Food Sdn Bhd ('the purchaser'). The second respondent, Mohd Repol bin Bidin ('the auctioneer') had since passed away and the chargee, perhaps on realizing that his redemptive objective would be better served by the High Court's judgment, elected to abandon the appeal.

To ensure a prescriptive appreciation of this case, some antecedent events leading to the present appeal are set out in detail: Siland, the chargor, at the commencement of the suit at Johor Bahru, was the registered owner of all that piece of land held under HS(D) 40269, Lot No PTD

A 18279, in the mukim of Plentong, in the district of Johor Bahru, the subject matter of these proceedings ('the said property').

The said property was at all material times charged by the chargor to Eu Finance Bhd, a licensed finance company incorporated in Malaysia ('the chargee').

B On 6 May 1985, due to a default on the part of the chargor, the chargee applied for an order for sale of the said property by public auction vide Johor Bahru High Court Originating Summons No 180/1985 and the order was made by Mahadev Shankar J of the High Court at Johor Bahru on 10 March 1986.

Pursuant to the above-mentioned order, the auctioneer, a licensed C auctioneer and appraiser (now deceased), was appointed by the court to conduct the sale of the said property by public auction and such auction was conducted on 25 January 1987.

Apparently, sales of land by public auction by the court in Johor state have always been conducted subject to a proclamation of sale holding conditions derived from two separate documents, one known as the 'Johor D conditions of sale' and the other, 'Special conditions of sale'. The proclamation which provides that the said property be sold subject to both conditions, has the special conditions annexed to it but any intending bidder has to inspect the Johor conditions of sale which is available at the auctioneer's office.

E Both conditions deal with matters pertaining to the conduct of public sales such as the description of property, the procedure of bidding, the requisition and the completion date. The Johor conditions of sale appear to be general in form whereas the special conditions contain some specific conditions of sale.

Now, reverting to the events at the auction sale, the purchaser, who was F the highest bidder at a price of RM196,000, was duly pronounced the purchaser of the property. He paid RM49,000 being a 25% deposit of the total purchase price as provided under cl 6 of the special conditions of sale and cl 2 of the Johor conditions of sale and the money was accordingly paid into court. According to cl 7 of both conditions, the balance of the purchase G money amounting to RM147,000 was to be paid into court within 30 days from the date of sale. As the auction had taken place on 25 January 1987, such payment should have been made by 24 February 1987. However, this was not done.

In view of this default, the chargor entered a private caveat on the property on 9 April 1987. In addition, he also wrote to the SAR, drawing H her attention to the default by the purchaser in completing the purchase of the property within the stipulated time and informing her that he had, on 24 February 1987, entered a caveat on the said property. We were given to understand that on 22 September 1988, the caveat was removed by LC Vohrah J on what the chargor's counsel termed as technical grounds.

I On 15 July 1987, after the filing of the summons-in-chambers but before the removal of the caveat and some 4½ months after the expiry of the date for the payment of the balance sum, the purchaser, by an originating summons filed in the same court, applied for and obtained an order for the completion date to be extended to 29 July 1987 (ie 14 days from the date

on the order). As only the chargee and not the chargor was made a party in the application, the chargor, as an aggrieved and interested party, applied on 8 October 1987 for leave to intervene, and, an order in terms of that application was subsequently made by LC Vohrah J on 21 February 1988. In that order, the learned judge also set aside the previous order wherein he had extended time of completion to 29 July 1987. No appeal was filed in respect of the subsequent order.

It is pertinent to note that at all material times, the chargor had objected to the issue of the certificate of sale to the purchaser on account of the purchaser's breach of condition to pay the balance of the purchase price within the stipulated time. In fact, on 10 August 1987, even before the purchaser could pay the balance of the purchase price, the chargor had commenced an action for a rescission of the contract and forfeiture of the deposit of RM49,000 paid by the purchaser.

However, two days after the order made by LC Vohrah J on 21 February 1988 (setting aside his previous order of extension), and six months after the chargor's action to rescind and forfeit and one year after the completion date, the purchaser forwarded the balance sum of RM147,000 to the senior assistant registrar. Despite all the contentious events and circumstances, the learned SAR accepted the balance sum and proceeded to issue the certificate of sale to the purchaser. On 18 October 1988, the purchaser presented the certificate of sale for registration to the Pengarah Tanah dan Galian Johor.

The chargor subsequently took out a summons-in-chambers for a final judgment to be entered against the purchaser; and the chargee, in turn, applied for the chargor's action to be struck out. Both summons were heard simultaneously by Richard Talalla JC (as he then was) on 25 June 1989 and at the conclusion of which on 25 February 1990, he declared the RM49,000 deposit forfeited, annulled the certificate of sale issued by the SAR on 29 September 1988 and cancelled the registration of transfer in respect of the said property. The learned judge also made orders for the return of the issue document of title and ordered the property to be resold.

Before this court, both counsel who argued the appeal with professional perspicuity, agreed that the issues be confined to the following:

(i) whether in a sale of land in a public auction, the sale is completed at the fall of the auctioneer's hammer;
(ii) whether the court has the power to extend time for a defaulting purchaser to complete the sale and purchase agreement after the agreed date of completion had passed; and
(iii) whether in the event of a negative answer to either circumstance above, the High Court is empowered to make the order as it did.

It was contended on behalf of the appellant that the learned judge at Johor Bahru could not have made the order as he did because at the fall of the auctioneer's hammer in a public auction, the sale was completed and whatever proprietary rights which belonged to the chargor had come to an end. In support of this agreement, the learned counsel for the appellant referred to ss 259(2) and 266 of the National Land Code 1965 ('the NLC')

and s 11 of the Johor Auction Sales Enactment 1932. These sections are reproduced below for easy reference.

> 259(2) The officer under whose direction the sale takes place shall —
>
> (a) receive the bids (including any bid by or on behalf of the chargee);
> (b) settle summarily any question arising in the course of the proceedings;
> (c) in the absence of any bid at or above the reserve price, withdraw the land or lease in question from the sale, direct that it be put up for auction on a subsequent date, either at the same or at a reduced reserve price, and see that the subsequent sale is publicly advertised in the like manner; and
> (d) subject to paragraph (c), *declare the sale concluded* in favour of the highest bidder.
>
> 266(1) Any chargor against whom an order for sale has been made under this Chapter may, at any time before the *conclusion of the sale*, tender the amounts specified in sub-section (2) to the Registrar of the Court or, as the case may be, Land Administrator (or, if the tender is made on the day fixed for the sale, to the officer having the direction thereof), and the order shall thereupon cease to have effect. (Emphasis added.)

Section 11 of the Johor Auction Sales Enactment 1932 says:

> A *sale* by public *auction* shall be complete when the auctioneer announces its completion by the *fall of the hammer* or other customary manner, and, until then, any bidder may retract his bid. At the time of announcing such completion the auctioneer shall forthwith audibly declare the name of the actual purchaser. (Emphasis added.)

It is pertinent to note that the terms 'sale concluded', 'conclusion of sale' and 'sale shall be completed' as used respectively in the three above-written sections are merely employed to signify that point of time when there has been an acceptance of the bid in accordance with the sale and purchase agreement or sometimes referred to as the conditions of sale. The sale at this juncture has only been concluded in the sense that the goods will no longer be offered for sale to prospective buyer and the successful bidder cannot be permitted to retract his acceptance.

Thereafter, each party to the contract of sale must perform his part of the obligation and until then no executed or actual sale has been concluded.

Even in the context of sale of goods, a sale is concluded only when there is a transfer of property from one person to another for money or other consideration. In *Foster (John) & Sons v Inland Revenue Commission*[1] at p 528, Lindley LJ said, 'I do not know what is necessary to constitute a sale, except a transfer of property from one person to another for money ...'.

So a reference to a sale being concluded at the fall of the auctioneer's hammer could only refer to that stage of the transaction of sale when there is concluded an agreement between the vendor and the highest bidder, the former to sell and the latter to purchase the goods. Hence the term 'conclusion' in the context of these sections can only mean conclusion of certain aspects of the sale when there is an agreement between the parties to sell and buy the property but the proprietary right has yet to be conveyed from the vendor to the purchaser.

In contrast to the sale of goods, the sale of land involves a more complex procedure which presents many special characteristics. Winfield, in his book *The Province of the Law of Tort* (1931) refers to a contract of sale of land as a 'contract conveyance', while RG Rowley in 18 Conv (NS) 302, described it as 'hybrid creature, born out of an uneasy marriage of the law of property and the law of contract, and doubtful to which parent they owe their primary allegiance'. Perhaps it would suffice for our present purpose to say that the general law of contract will initially apply in any sale of land. Thereafter, many rights and obligations which are incidental to the property will arise. An auction to sell land will necessarily involve the elements of contract when the bid is accepted and subsequently convenyence when the land is transferred to the buyer.

To answer the point raised by counsel for the appellant, the issue on the transfer of proprietary rights at the fall of the hammer, it is imperative that we take a brief look at the incidents affecting the transfer of land after the contract had been concluded between the parties.

In a sale of land under the Torrens system, the estate and interest in the land remains with the proprietor until he has done all that is necessary to divest the estate out of himself and vest it in the transferee — see *Taylor v Land Mortgage Bank of Victoria Ltd.*[2] This principle is embodied in s 267(1)(a) of the NLC which reads:

> Any certificate of sale given to a purchaser under sub-section (3) of section 259 or sub-section (4) of section 265 in respect of any charged land or lease shall be treated for all the purposes of this Act as an instrument of dealing, and shall be registrable accordingly under Part Eighteen; and, upon the registration thereof —
>
> (a) the title or interest of the chargor shall pass to and vest in the purchaser, freed and discharged from all liability under the charge in question and any charge subsequent thereto; ...

To put it shortly, completion under the Torrens system refers to that stage of the conveyence when the land is registered with the Registrar of Titles.

The position under our case law is however a little less demanding. According to the authorities, on the execution of the contract, payment of the full purchase price and the delivery of the document of title, the vendor becomes a constructive trustee for the purchaser and the latter acquires an equitable right in the land.

In *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors,*[3] Ong Hock Sim FJ, after consulting various English authorities, expressed the court's judgment in the following terms [at p 47]:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

In the same case, Gill FJ expressed the opinion that the vendor became a constructive trustee when the full purchase money had been paid and the purchaser had received the instruments of transfer and the title deeds.

In *Aberfoyle Plantations Ltd v Khaw Bian Cheng*,[4] the Privy Council observed that the vendor became a 'bare trustee' on payment of the purchase money. Similarly, in *Chang v Registrar of Titles*,[5] it was held that the vendor has no right of his own and became a holder of the legal estate on payment of the purchase money.

Although the authorities seem to differ on the level of transaction at which the bare or constructive trusteeship would arise, the rationale are unanimous on one issue, ie such trusteeship can only arise on payment of the balance of the purchase price or on payment of the full purchase price. In *Peninsular Land Development Sdn Bhd v K Ahmad*,[6] Suffian LJ (as he then was) said that the beneficial ownership passes to the purchaser as soon as the purchase price has been paid. So was it held in the New Zealand case of *Official Assignee v Johnston*[7] where the court held that the purchaser only became owner of the land subject to his obligation to pay the purchase price.

It would appear from the above-cited cases that the vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full — see *Karruppiah Chettiar v Subramaniam*[8] at p 119.

Applying these rationale to the facts of our present appeal, it is obvious that at the fall of the auctioneer's hammer, no money had yet changed hands between the parties and neither had any documents been signed. Even if that time is to be liberally construed to include the events transpiring shortly thereafter, the purchaser could only rely on the down payment of 25% of the purchase price and his acceptance of the conditions of sale. The issue of non-payment of the full purchase price alone is sufficient to negate the constitution of any constructive or bare trust and consequently, the asserted transfer of the proprietary right from the vendor to the purchaser.

The High Court's decision in *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan*[9] was cited in argument in this court and the court below as tending to support the appellant's contention on this particular issue. In the course of that part of his judgment dealing with the chargee whom he said should be regarded as a vendor, VC George J went on to say 'I think I should and I do lay down that the defaulting chargor abdicates his right as registered owner of the land vis-a-vis selling it, in favour of the chargee'.

We do not think that the above expression is intended to lay down the law that in a sale under s 256 of the NLC, the chargor renounces or surrenders all his proprietory rights in favour of the chargee, neither do we contemplate any transfer of such proprietary rights from the chargor to the chargee. The court makes an order for sale at the request of the chargee after the chargor has failed to satisfy the court of the existance of a cause to the contrary. The order provides for certain conditions and procedures to be followed at the sale. The chargee's participation in this instance is only confined to the preparation of the conditions of sale in terms of the order and the production in court of the issue documents of title — see s 258(2) of the NLC. On the other hand, the chargor is prevented by the court's order from denying the chargee's statutory right of sale, but he may

nevertheless exercise his right as a proprietor to dispute any impropriety or anything done in breach of the statutory conditions of sale. In any event, s 267(1)(a) of the NLC, which provides that the passing of the interest in the proprietary right from the chargor to the purchaser would occur on registration and after the issuance of a certificate given under s 259(3)(a), clearly negates any such judicial proposition that the chargor abdicates his proprietary rights at that stage of the auction sales.

The legal position between the chargor and the chargee had been briefly referred to in the Federal Court case of *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd*[10] at p 270 as follows:

> Our land law does not recognize a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, ie ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognizes a mortgage in the sense of Torrens system, referred to by text written as Torrens mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security.

The passage from VC George J's judgment in *United Finance*'s case[9] appears to have been overstretched beyond the efficacy of its aesthetic language.

The second issue raised in this appeal, ie on the power of the SAR to extend time in favour of a defaulting purchaser, has been dealt with in several High Court judgments other than the present judgment on appeal. However, the circumstances affecting these cases differ slightly from case to case. *Malayan United Finance v Liew Yet Lan*[9] is an application by a chargee against the order made by the SAR extending time in favour of a defaulting purchaser. In that case, VC George J held that the chargee is to be regarded as a vendor and the conditions of sale as the sale and purchase agreement. However, the learned judge went on to hold that where either the conditions of sale or the NLC contain no provisions empowering alterations to be made to the conditions, then the SAR shall have no power to alter the original date specified in such conditions so as to extend time of completion. It is not mentioned and we can only assume that the chargor was not made a party to the proceedings.

Barely a year after that, in the same court in Johor Bahru, a decision on a somewhat similar subject was made in *Development & Commercial Bank Bhd JB v Kim Ming Choon.*[11] In that case, an application to extend time to pay the balance of the purchase money was made ex parte before the SAR by the purchaser. Neither the chargee nor the chargor were notified of the application. James Foong JC (as he then was) in applying the rationale of *Malayan United Finance Bhd*'s case[9] that the chargor 'abrogates' his rights to the chargee, went on to say that the chargor's rights are restored once the sale is aborted. The learned judicial commissioner agreed with *Siland Sdn Bhd & Anor v M & J Frozen Food Sdn Bhd & Anor*[12] (the present case on appeal) and proceeded to express his view that the SAR has no power to vary the order for sale issued by a judge. Any variation of such order must be heard before a judge. On the issue of indefeasibility, the learned judicial commissioner held that the protection under s 340 of the NLC can be removed through an order under s 417 of the NLC.

The third case in sequence to the dates of judgments is *Kuala Lumpur Finance Bhd v Yap Poh Khian (Teo Sik Eng & Anor, Interveners)*.[13] In that case, Lim Beng Choon J whilst adopting the proposition of the chargor abdicating his rights to the chargee, as laid down in *Malayan United Finance*'s case,[9] proceeded to explain [at p 481]:

> But this general proposition does not mean that if an auction sale has been conducted fraudulently, collusively or otherwise improperly to the prejudice of the chargor, he cannot intervene to set aside the sale whether or not the purchaser is privy to it. The effect of setting aside the sale is to restore the chargor's right of discharge of charge or under English common law mortgage, the equity of redemption.

The learned judge then noted that the sale of charged land may be set aside not only in cases involving corruption, collusion or fraud but also in cases where the sale is tainted with impropriety. On the issue of extension of time to the defaulting purchaser, he held that the SAR had no right to do so without the consent of the chargee. It would appear from this judgment that the learned judge recognized the chargor's right to set aside the sale in cases of fraud, collusion or impropriety although he was not a party to the sale and purchase transaction.

The most recent case on this subject is reported in *Public Bank Bhd v Phan Seng Kee & Ors*.[14] Peh Swee Chin J (as he then was) expressed the position of the chargee as follows:

> In my view, the chargee had a statutory right of sale subject to judicial leave. Please see *Suppiah v Ponnampalam* [1963] MLJ 202. The chargee must be regarded as a vendor, please see *Lim Beng v AVA Alagappa Chetty* [1922] 1 FMSLR 264; *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317; *Siland Sdn Bhd & Anor v M & J Frozen Food Sdn Bhd & Anor* [1990] 2 MLJ 502. The auction being a judicial sale would be under discretion of the court, and also would be under such direction, in any event, by s 257 of the National Land Code.

The learned judge held that with the chargee assuming the place of the vendor and the purchaser as the successful bidder, they were in a position, as two contracting parties, to alter the contract of sale, ie with the approval of the court. In doing so, the court has to consider the interest of the chargor.

Three subsidiary issues arise from this power to extend time. Firstly, is the chargor a necessary party to this application for extension of time before the SAR or the judge. Secondly, is his consent or his interest relevant towards considering that application. Thirdly, can the SAR or judge vary the condition of sale in the absence of and/or without the consent of the chargor.

VC George J is of the view that such variation cannot be done without the consent, and impliedly, in the absence of the chargee. He was silent on the rights of the chargor probably for reason of his earlier finding that the chargor had abdicated his rights to the chargee. James Foong JC however, held that although the chargor has abrogated his rights to the chargee, the former's rights are restored by the chargee's breach of the conditions of sale. Although the learned judicial commissioner commented on the chargor's

rights being completely ignored, he made no finding on the issue. Likewise, Lim Beng Choon J in holding that the chargor can intervene to set aside an improper sale, made no mention as to whether the SAR's failure to include the chargor at the hearing of the application to extend time is tantamount to a denial of the chargor's right or an act of impropriety. Peh Swee Chin J while holding that the chargee and purchaser possess the right to alter the conditions of sale, they must in seeking the approval of the court notify and hear the chargor. He appears to be of the view that once this has been complied with, and the court has considered the chargor's interest, his consent is immaterial. In *Siland*'s case[12] (present case on appeal), Richard Talalla JC (as he then was) held that an extension of time without reference to the chargor is an abrogation of the chargor's right.

Be it so, one common principle of law emerges from these judgments and that is the chargor's proprietary right *is not* entirely extinguished and so he is entitled to make an application to set aside an improper sale. We are not prepared to construe that a chargor is divested of his proprietary rights at the fall of the hammer nor are we disposed to interpret the complete surrender of his rights to the chargee at the making of the order of sale so as to deprive him of the rights to challenge the propriety of the sale. As mentioned earlier, the divesting of the chargor's right occurs only on completion of the contract of sale and conveyence when the chargor becomes a constructive trustee for the purchaser.

In the *Malayan United Finance Bhd v Tan Lay Soon*,[15] Jemuri Serjan SCJ (as he then was), sitting in another panel of this court elucidated the respective interests of the chargor and the chargee in respect of a charged land as follows [at p 507]:

> Under the National Land Code the interest in the land subject to a charge does not vest in the chargee but, upon registration of a charge, it tenders the land subject to the charge liable as a security only in accordance with the provisions of the charge, express or implied (s 243). Under s 244(1), the chargee is entitled to the custody of the issue document of title so long the liability stays under the charge. There is no statutory provision for the discharge of the charge by the chargor but his right and that of a borrower to do so is embodied in the provisions of the charge itself. See cl 3(ii) of the annexure to the charge and s 249(1) of the National Land Code. However, under s 266(1) any chargor may at any time before the conclusion of a judicial sale of a charged land tender the amounts due to the registrar of the court or the collector and the amount sufficient to cover all expenses in connection with the judicial sale. Since the right or interests in the charged land remains with the registered owner he has nothing to redeem.

The chargor does not abrogate all his rights to the chargee at the making of the order for sale. He is merely compelled to abide by the court's order for his property to be sold in accordance with the statutory safeguards on his interest as provided under ss 257 and 258 of the NLC. He is a necessary party to the application for sale and must be served with a summons or writ in the manner provided under O 83 of the Rules of High Court 1980 in respect of an application under s 256, and, with a summons as provided under s 261(1)(c) of the NLC in respect of an application under s 260 of the NLC. Even after the order of sale has been made and when the auction sale is already in progress, but before a bid has been accepted, he still

retains the right to tender payment of the amount which he owes the chargee (which may be less than the value of the land on sale) and call off the sale — s 266 of the NLC. The exercise of such rights do not appear to us to be consistent with a proprietor who has surrendered absolutely his rights over the land to another.

The order for sale confers on the chargee only the statutory rights to a judicial sale. A sale under s 256 or s 260 of the NLC is a judicial sale ordered by court on the application of the chargee. The chargor, who has until that stage not been divested of his proprietary rights, may intervene to set aside the sale in the event of fraud, impropriety or the breach of any statutory or contractual terms of the sale. We agree that the terms or conditions of sale may be varied, if having regard to the interest of both the chargor and the chargee, it is fair to do so; but the sale being a judicial one, has to be done by the court after giving the chargor the right to be heard. As the court's power to order the sale, including the authority to fix the price and conditions of sale, is derived from the statutory provisions of the NLC after giving the chargor the right to be heard, it is manifest that any alteration to the terms or conditions must likewise be exercised.

We consider any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor is ultra vires the authority to sell under the NLC. Therefore we would, in answer to the second issue raised, say that as the alteration of the completion date was made without giving notice to the chargor, the subsequent order made by the SAR was void as being ultra vires the NLC.

The last issue is basically on the authority of the court to cancel the name of the purchaser which had by then become indefeasible by subsequent registration. The registration under ch 4 of Pt XVIII of the NLC does not necessarily make the title of the land entirely unimpeachable. Indefeasibility can be rebutted not only in instances of fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.

A purchaser of land might fail to obtain a good title in two distinct ways. First, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule is that no person can give a better title than he had — nemo dat quod non habet. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s 340(3) of the NLC where a bona fide purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility — see *Gibbs v Messer*.[16] Under this principle, the registration of the insufficient or void instrument can be set aside.

It would appear, however, from the facts in this appeal that the challenge on the indefeasibility of the purchaser's interest could appropriately be dealt with under paras (b) and (c) of s 340(2) of the NLC.

In *United Malayan Banking Corp Bhd v Syarikat Perumahan Lunas Sdn Bhd (No 2)*,[17] Edgar Joseph Jr J (as he then was) when dealing with the effect of registration obtained by means of a void and insufficient instrument, said [at p 356]:

> In these circumstances, the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of s 120 of the Code, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (s 340(2)(b)) and also because the Registrar of Titles, in registering the charge, had acted ultra vires the powers conferred upon him: s 340(2)(c). The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute: *Jagabandhu v Radha Krishma* ILR 36 Cal 920, particularly when as here, the non-compliance goes to the root of the thing. In other words, if the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof, will be ultra vires and no person can be estopped from putting forward the contention that what was done was illegal or void: *University of Delhi v Ashok Kumar Chopra* AIR 1968 Delhi 131.

In *Teh Bee v K Maruthamuthu*,[18] Ajaib Singh J (as he then was) held that a registration after the approval of alienation had lapsed, was made ultra vires the NLC. In the course of his judgment, the learned judge said [at p 11]:

> I held that in the present case the alienation of the land under qualified title to the respondent did not involve a mere irregularity or non-compliance with the statutory procedure relating to the method of acquiring alienation of qualified title but that the state authority had acted ultra vires the National Land Code and therefore the alienation of the land under qualified title was illegal and a nullity. Consequently, the conclusiveness of title and the indefeasibility provisions in the Code were rendered irrelevant and inapplicable. In the event, I held that when she instituted proceedings against the appellant the respondent had no locus standi in the matter as she was not a lawfully registered proprietor of the land. I accordingly allowed the appeal with costs.

We agree with what was stated in the judgments above. In our present appeal, failure to comply with the statutory requirements of paras (a) and (b) of s 258 and para (c) of s 261(1) of the NLC is not just a case of non-compliance with some practical guidelines in the NLC, a mere irregularity, but it is an illegality which strikes at the root of the proprietor's right to be heard.

Subsection (2) of s 258 states that a chargee on whose application the order was made shall prepare the conditions of sale, in accordance with the terms of the order and any determination thereunder by the registrar of the court. In our present appeal, the effects of extending the time of payment is to cause a material change in the conditions of sale and thus render it no longer in accordance with or within the terms of the original order and determination made by the SAR. Consequently, the amended conditions of sale bearing some different terms or directions from the original conditions

has to be served again in accordance with s 258(1)(a) of the NLC on the chargor. Failure to do so is a clear transgression of the statutory provisions of that section. Moreover, hearing of the originating summons on the application to extend time, without service to the chargor, is perceptibly not in accordance with the law relating to civil procedure — (see s 256(2) of the NLC).

Under ss 258 and 261, the chargor is not only given the opportunity to show cause as to why his property should not be sold but also to participate in the deliberation on matters affecting his interest, such as the reserve price, the time, venue and conditions of sale. Over and above this, the SAR appears to have completely ignored the subsequent order setting aside the date of extension as well as the various contentious applications, objections and dissentious communications between the parties. The purchaser, on the other hand, in spite of his awareness of the contentious situation and the subsequent order setting aside the extension date, unheedingly went on to apply and obtain the certificate under s 259(3) of the NLC and subsequently to register the property.

We are unable to say whether this faux pas was tainted with mala fides and so describe it as a fraud but we would certainly conclude this conduct as being a serious impropriety or, in the words of Walsh J in the Australia's High Court Case of *Forsyth & Anor v Blundell & Anor*,[19] 'conduct which amounts to a reckless sacrificing of the interest of the mortgagor'.

In any event, we are satisfied that the certificate issued by the SAR was ultra vires the statutory provisions of the NLC and the title was unlawfully acquired by the purchaser. This finding by itself would have rendered the title of the purchaser defeasible under para (c) of s 340(2) of the NLC and under such circumstances, the learned judge had arrived at a correct decision when he made the order.

We therefore dismiss this appeal and confirm the order of the High Court. The appellant shall pay the costs here and in the court below. The deposit is to be paid to the respondent on account of taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim